

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60437

FILE: B-116694

DATE: JAN 28 1976

MATTER OF: Judge Eugene Black, deceased - Lump-sum annual leave payment

DIGEST:

Beneficiary of deceased Tax Court judge claims payment for annual leave which judge had accrued. While 5 U.S.C. § 5551(a) requires "separation" from service as prerequisite to lump-sum payment of annual leave, judge met that requirement upon retirement in 1953 under 26 U.S.C. § 7447, even though he remained subject to call by chief judge. Hence, judge's entitlement to accrued leave arose in 1953, and beneficiary's claim is barred by statute of limitations.

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This action is in response to a request by the Court Executive of the United States Tax Court for an advance decision as to when a retired Tax Court judge is entitled to a lump-sum payment for accrued annual leave.

The question arises in regard to a claim by the beneficiary of the late Judge Eugene Black who retired from the Tax Court in 1953 and who died in 1975. Judge Black was appointed in 1929 to the U.S. Board of Tax Appeals, later renamed the Tax Court of the United States, then an independent agency in the Executive Branch of the Government. In 1969, Congress made the Tax Court into a court of record under Article I of the Constitution (Pub. L. No. 91-172, § 951, 83 Stat. 730). Until 1953 Judge Black accumulated annual leave under applicable leave statutes. The Act of July 2, 1953, 67 Stat. 136, now codified in 5 U.S.C. § 5551(b), exempted certain officers appointed by the President, including Tax Court judges, from the Annual and Sick Leave Act of 1951. The Act further provided that leave accrued prior to the date of the exemption could be liquidated in accordance with the act of December 21, 1944, now codified as 5 U.S.C. § 5551(a), which provides:

"An employee * * * who is separated from the service * * * is entitled to receive a lump-sum payment for accumulated and current accrued

annual or vacation leave to which he is entitled by statute."
(Emphasis added)

Judge Black retired on November 30, 1953, pursuant to the retirement provisions of the Internal Revenue Code of 1939, as amended, now codified in 26 U.S.C. § 7447 (1970). Under subsections (d) and (e) of that statute, a Tax Court judge with the appropriate number of years service may elect, as did Judge Black, to receive retirement pay, under the conditions of subsection (c) that one who receives retired pay "may be called upon by the chief judge of the Tax Court to perform such judicial duties with the Tax Court as may be requested of him for any period or periods specified by the chief judge * * *." The periods of such service may not exceed 90 days without the individual's consent, and he is relieved from such duties during illness or disability. The acts of such a retired judge have full force and effect, but any such individual is not counted as one of the 16 regular members of the Tax Court.

After his retirement Judge Black did perform at the call of the chief judge until 1966 when, because of advanced age, he was relieved from such performance under subsection (c)(2). During the entire period after his retirement in 1953 until his death in 1975, he continued to receive full compensation as a retired judge.

The question of Judge Eugene Black's entitlement to the lump-sum leave payment previously arose prior to his retirement. By decision of this Office, both he and Judge Hill were held entitled to lump-sum payment upon retirement for the total amount of annual leave accrued prior to July 2, 1953. B-116694, September 2, 1953. Judge Black, however, on November 29, 1953, waived his terminal leave pay in a letter to the chief judge.

If the position taken in our prior decision is to be sustained, any subsequent claim for the payment of accrued annual leave by or on behalf of Judge Black would have been barred 10 years after his retirement under 31 U.S.C. §§ 71a and 237. However, it is claimed that the accrued leave due Judge Black was actually not payable until his death in 1975 because only then did he become "separated from the service" for the purposes of 5 U.S.C. § 5551. If so, of course the claim would not be barred and could be paid to the judge's beneficiary.

In enacting the retirement plan for Tax Court judges (Act of August 7, 1953, Public Law 219, Ch. 352, 83d Congress, 67 Stat. 482), Congress specifically intended to provide an adequate retirement for Tax Court Judges comparable to that of other federal judges and, additionally, to facilitate the handling of the court's increasingly heavy workload through the appointment of younger persons as judges and through the recall provisions. Previously, the judges of the Tax Court had been under the Civil Service Retirement Act in contrast to other Federal judges. S. Rep. No. 675, 83d Cong., 1st Sess. 2-4 (1953). Though the effect of the recall status on the requirement of "separation" for lump-sum leave payments was not specifically addressed, it seems apparent that there was no intent to strip from Tax Court judges those benefits enjoyed by other retiring federal employees under 5 U.S.C. § 5551. Indeed, the intent was to provide more attractive benefits, not less. S. Rep. No. 675 supra.

We conclude that judges of the Tax Court who retire under 26 U.S.C. § 7447 (1970) have become "separated from the service" for the purposes of 5 U.S.C. § 5551(a) at the time of their retirement. The basis for our conclusion is as follows:

(1) A Tax Court judge serves a term of years under presidential appointment and Senate confirmation, and the Tax Court is limited by law to sixteen judges. Upon conclusion of his term or retirement, the judge has no office.

(2) A Tax Court judge must retire to receive the retired pay benefits under 26 U.S.C. § 7447 and must elect to receive such benefits by filing a notice with the chief judge. The election, once made, is irrevocable and disqualifies the judge for any benefits under the Civil Service Retirement Act.

(3) A retired judge may be called upon, under subsection (c) of section 7447, by the chief judge to perform judicial duties, but he may not be required to so perform for more than 90 days a year or during illness or disability and he does not count as one of the 16 judges who compose the Tax Court. Moreover, subsection (a)(3) of section 7447 provides that "the term 'judge' means the chief judge or a judge of the Tax Court; but such term does not include any individual performing judicial duties pursuant to subsection (c)." (Emphasis added.)

(4) There was a clear intent by Congress to enable Tax Court judges to retire with liberal benefits in order to meet the workload of the Court through appointment of younger judges. Those who retired were to remain "retired judges" thereafter, even though they were subject to recall. The recall provisions were specifically authorized by law to enable such persons to serve after retirement in order that the Tax Court might benefit from their experience for periods to be determined by the chief judge.

Thus, Tax Court judges, like the late Judge Black, who do retire under 26 U.S.C. § 7447 must be said to have "separated from the service" for the purposes of 5 U.S.C. § 5551(a). To hold otherwise would run contrary to congressional intent and render the lump-sum payment for accrued leave a mere death benefit since most retired Tax Court judges retain their status as "retired judges" until death. We do not believe this was intended because one of the purposes of providing lump-sum leave payments was to assure that employees do not forfeit their leave entitlements. 33 Comp. Gen. 622 (1954); B-165516, November 22, 1968.

In Booth v. United States, 291 U.S. 339 (1934), the Supreme Court held that a district or circuit judge of the United States who retires pursuant to section 260 of the Judicial Code, as amended, now 28 U.S.C. § 371 (1970), continues in office within the meaning of section 1 of Article III of the Constitution and his compensation may not be diminished. The Booth case is distinguishable from the present case because district and circuit judges have lifetime tenure under Article III of the Constitution, whereas Tax Court judges are appointed for a term of years. Moreover, Booth did not involve any question of entitlement to lump-sum leave payments which is the sole question in the present case. Our decision herein is limited to an interpretation of when a Tax Court judge is "separated from the service" for the purpose of receiving a lump-sum payment for leave under 5 U.S.C. § 5551(a), and we do not purport to address the issue of the status of retired Tax Court judges for any other purpose.

Since Judge Eugene Black was entitled to a lump-sum leave payment upon his retirement in 1953, the claim by his

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beneficiary at this time is barred by the statute of limitations
in 31 U.S.C. §§ 71a and 237.

R.F. KELLER

Deputy Comptroller General
of the United States